VALIDITY OF A CLASSIFICATION OF BANKS BASED UPON THE AMOUNT OF THEIR AVERAGE ANNUAL DEPOSITS.—Laws exacting a license for the privilege of engaging in the banking business are proper, as providing for a regulation of the business under the general police power of the State. License laws usually attempt a classification of the occupations affected, which classifications are often assailed under the Fourteenth Amendment to the Constitution of the United States, as being unjust, unequal, and arbitrary.

The legislature of the State of New York recently passed an amendment to the general business law in relation to private banking. Laws, 1910, c. 348. In a suit to restrain its enforcement, the Supreme Court, Special Term, New York County, granted the injunction, holding the amendment void, on the ground that the classification therein made, denied to the plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. *Lee* v. *O'Malley et al.* (1910), 126 N. Y. Supp. 775. In a separate, but similar, suit in the Federal courts, involving the same law, the Supreme Court of the United States held the law valid, declaring that the classification therein made no unconstitutional discriminations. *Engle* v. *O'Malley et al.* (1911), 31 Sup. Ct. 190; affirming 182 Fed. 365.

The law in question provides that no person shall engage in the business of receiving deposits of money for safekeeping or for the purpose of transmission to another or for any other purpose, without a license, to be granted at the discretion of the State Comptroller. Section 29 d of the act exempts from its provisions five classes: the fourth class exempted comprises private bankers where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than $500 during the fiscal year preceding an affidavit to that effect; the fifth class exempted consists of private bankers who file a bond, approved by the Comptroller, for $100,000, when the business is in cities of the first class, or of $50,000, elsewhere.

In both the State and Federal Courts, it was urged that the act is invalid, in that it makes unconstitutional discriminations, imposes unequal conditions, creates arbitrary classifications, and otherwise denies the equal protection of the law to the bankers it affects.

It is not the purpose of the Fourteenth Amendment to prevent the States from classifying the subjects of legislation or from making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. 9 FED. CASES ANN. 546; *Field* v. *Barber Asphalt Pav. Co.*, 194 U. S. 618; *Tinsley* v. *Anderson*, 171 U. S. 101; *Walston* v. *Nevin*, 128 U. S. 578. When there are reasonable economic or political or social reasons for doing so, certain occupations or industries or even certain classes of persons may be selected for special regulation. 2 WILLOUGHBY, THE CONSTITUTION (1910), 886. Where a distinction is made, however, there should be a reasonable ground therefor, one based on administrative or political necessity or commerce or on economic needs. 2 id. 881. Equality of operation, moreover, does not mean indiscriminate operation on persons merely as such, but on persons according

to their relations. *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283. The power of classification is upheld whenever such classification proceeds upon any difference that has a reasonable relation to the object sought to be accomplished. *Atchison, etc. R. Co.* v. *Matthews*, 174 U. S. 103; *Heath & M. Mfg. Co.* v. *Worst*, 207 U. S. 338; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *K. C. Stock Yards Co.*, 183 U. S. 79; 62 CENT. L. J. 124, et seq.

To be obnoxious, the classifications must be arbitrary and destitute of reasonable basis. *Fidelity Mut. L. Assoc.* v. *Mettler*, 185 U. S. 308, 325; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 562, 43 L. ed. 552, 19 Sup. Ct. 281. Necessarily, there must be great freedom of discretion, though it may result in ill-advised, unequal, and oppressive legislation. *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238. That is to say, there is always a strong presumption that such legislation is valid. *Hawthorne* v. *People*, 109 Ill. 302. The question, what regulation shall be made, if any, is a question for the States to determine, within the police power; and unless the regulations are so utterly unreasonable and extravagant in their nature and purposes that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the States to pass, and they form no subject for Federal interference. *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. 633.

But granting that persons in different callings may be legally classified under separate heads, which is, of course conceded, yet the cases are certainly near the border line, when discriminations are made among those engaged in the same occupations. *Vermont* v. *Harrington*, 68 Vt. 622. The Fourteenth Amendment undoubtedly means that no impediment shall be interposed to the pursuits of any one except as applied to others under like circumstances; that no greater burdens shall be laid upon one than are laid upon others in the same calling and conditions, said Mr. Justice FIELD, in *Barbier* v. *Connolly*, 113 U. S. 27, 31. A State cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *M., K. & T. Ry.* v. *Haber*, 169 U. S. 613, 626; *Sinnott* v. *Davenport*, 22 How. 227, 243; *Fox.* v. *M. & H. Soc.*, 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681, 80 Am. St. Rep. 767; *State* v. *Hinman*, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22; *Sams* v. *St. L. etc. R. R. Co.*, 174 Mo. 53, 73 S. W. 683, 61 L. R. A. 475; *Soon Hing* v. *Crowley*, 113 U. S. 703, 708, 709.

Nevertheless, persons engaged in the same trade have, for the purpose of State regulation, been divided into different classes, and such classification has been upheld on certain occasions. For example, retailers and wholesalers are grouped separately. *Cook* v. *Marshall*, 196 U. S. 261, 25 Sup. Ct. 233. In *St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203, 46 L. ed. 872, 876, a classification of coal mines for the purpose of inspection, etc., into those employing five or less than five and those employing over five was held reasonable, on the ground that the smaller mines would not be likely to need

the careful inspection required by the larger mines. A similar classification was upheld in *McLean* v. *Arkansas,* 211 U. S. 539. Likewise, in *Musco* v. *United Surety Co.,* 196 N. Y. 459, 466, 90 N. E. 171, 134 Am. St. Rep. 851, the New York Court of Appeals intimated that they could find sufficient reason to justify the legislature in distinguishing between steamship companies possessing large capital and credit, and individuals of the class to which the appellant's principal belonged, who frequently might be expected to be without either.

On the contrary, however, in *Cotting* v. *Goddard,* 183 U. S. 79, 46 L. ed. 92, the court said that there can be no pretense that a stock-yard that receives ninety-nine head of cattle per day is not doing the same business as one receiving one hundred head. It would seem to follow that a banker, receiving average annual deposits to the value of $499, is doing practically the same business as one receiving deposits to the value of $501. Speaking of classifications among persons engaged in the same business, based simply upon the amount of business that each may do, the Supreme Court, in the last mentioned case, went on to say: "If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would." They cited *State* v. *Haun,* 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369, where a statute was held unconstitutional that required corporations or trusts employing more than ten persons to pay wages in cash only.

Legislatures, therefore, may define classes of property and individuals that actually exist, but they can not create them. They should not be allowed to classify men engaged in the same business simply according to the wealth or the amount of business they do. GUTHRIE, THE FOURTEENTH AMENDMENT (1898) 136. There is a long note on classifications in COOLEY, CONST. LIMITATIONS, Ed. 7, 568 et seq., which cites, among numerous other cases, *State* v. *Mitchell,* 97 Me. 66, 53 Atl. 887. That case involved a hawkers and peddlers act requiring those paying less than $25 taxes on stock to pay a license fee, and exempting those paying that amount or over. The classification therein made was declared merely arbitrary discrimination, not based upon any inherent difference of kind. The Court said: "No one now questions that these constitutional provisions (Federal and Maine) prevent a State from making discriminations as to their legal rights and duties between persons on account of their * * * wealth or poverty, or on account of the amount of business they do."

Coming now to the reasoning of our two principal cases, we find the New York Court saying: "I can see that from certain points of view, in the banking business, as for example in considering ability to issue credits, the possession of wealth may be regarded as some guaranty of responsibility and stability. Still in the last analysis it is the integrity and sound business judgment of the banker which afford to a mere depositor the assurance of the safety of his funds. * * * Moreover, relief is here sought by a plaintiff who is a 'curb broker.' It is true that defendants do not concede in so many words that the statute covers his case; but the plaintiff so alleges, and it is not denied, and the argument has proceeded before me on the theory that the provisions of the act do indeed cover his business. None of the facts

adduced by the Commission of Immigration in its report, none of the considerations relating to inexperienced foreigners recently arrived, and none of the many other distinctions which correctly or incorrectly are attributed to immigrant depositors with private bankers have any relation to customers of brokers."

The court thereupon held there was no reason for imposing upon brokers a requirement of wealth or a classification based upon the amount of the average annual deposits of their customers.

In the Supreme Court of the United States ,the basis of the decision upholding the law, was as follows: "Legislation which regulates business may well make distinctions depend upon the degree of evil." *Heath & M. Mfg. Co*, v. *Worst*, 207 U. S. 338, 355, 356, 52 L. ed. 236, 244, 28 Sup. Ct. 114. "It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and the small. But in this case size is an index. Where the average amount of each sum received is not less than $500, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect." The court then cited *Musco* v. *United Surety Co.*, 196 N. Y. 459, 465, 134 Am. St. Rep. 851, 90 N. E. 171 and *McLean* v. *Arkansas*, 211 U. S. 539, 551 53 L. ed. 315, 321, 29 Sup. Ct. 206.

Do not the very facts that the curb broker's business was found not to be within the evil aimed at, that the statute apparently covers the good as well as the evil, do not those facts indicate that the attempted classification was not based upon the cause of the evil complained of, but upon a mere accompanying circumstance, the amount of business done? That, while perhaps covering the evil, it is quite likely to go further and to work hardship and injustice upon persons coming within its terms, but not within its reason? Even where the selection is not obviously unreasonable and arbitrary it has been held that if the discrimination is based upon matters that have no relation to the object sought to be accomplished, it is unconstitutional. *Atchison, etc. R. Co.* v. *Matthews*, 174 U. S. 96, 104. And, similarly, if one person is treated differently from others who are in the same relation to the purpose of the statute, he is deprived of the equal protection of the law. *Ohio* v. *Dollison*, 194 U. S. 447.

Finally, then, a classification based upon wealth alone or upon the amount of business transacted would seem likely to fail for two reasons. First, because an amount, necessarily arbitrary, is fixed, and burdens are imposed or benefits conferred upon persons doing an amount of business one dollar above or below that amount, although those persons are doing practically the same business and under the same conditions, as the other persons, just across the line. Secondly, because some other reason—not at all depending upon the amount of business done—is quite likely to be the real reason for the regulation. The result will be that, in operation, the statute will cover cases outside of the reason of the law, and, as to those cases, it will be arbitrary and unreasonable, as having no relation to the object sought to be accomplished or to the evil sought to be eradicated. C. L. C.